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Supreme Court of the United States

October Term, 1940 No. 51

JAMES M. WRIGHT, *Petitioner,*

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION FOR A MODIFICATION OF THE OPINION.

[Delivered by Mr. Justice Douglas on December 9, 1940]

1. **Although the reversal was correct, the reasons assigned therefor were erroneous, and should be withdrawn (p. 2).**
2. **The Opinion [but without mentioning the fact] overruled the constitutional decision in the *Radford* and *Vinton Branch* cases (pp. 3, 5-8).**
3. **Constitutionally, the mortgagee has the paramount right to a judicial public sale so as to assure that the mortgaged property shall be specifically devoted to the payment of the mortgaged debt (pp. 5-8).**
4. **Criticism of the Opinion (pp. 9-13).**
5. **Congressional intent refutes the Opinion's interpretation of § 75(s) (3) (pp. 13-16).**

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Union Central Life Insurance Company (1) frankly concedes that the reversal was proper [although upon a ground not mentioned by this Court]; but (2) petitions that the Opinion be modified so as to *eliminate* its irrelevant holding [directly contrary to the *Radford* and *Vinton Branch* cases], that §75(s)(3) of the Frazier-Lemke Act (as amended) (i) permits the mortgagor—against the wishes of the mortgagee—to secure a clear title upon the payment of an appraised or fixed valuation; and (ii) denies to the mortgagee the right to have the mortgaged property specifically applied to the mortgage debt through a judicial sale.

I. Reason why the Reversal was entirely correct.

Union Central *frankly concedes* that the judgments of the District Court, and of the C. C. A. ordering a sale of the mortgaged property *were erroneous* (R. 57, 157); and that (i) they *ought* to have been reversed; (ii) they were *correctly* reversed; and (iii) they might properly have been *even more extensively reversed,* rather than merely *modi-*

fied—all because Union Central had prayed for, and *erroneously obtained,* a judgment below for the judicial sale of the mortgaged property, *before* the necessary statutory conditions precedent had been complied with [§ 75(s)(1)(2)(3) R. 24(6)].[1]

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[1] Those conditions precedent [which must be complied with *before* a mortgagee is justly entitled to a judicial sale under § 75(s)(3)] are as follows:

(*a*) The appraisers shall appraise the property "at its then fair and reasonable market value" (s). **This was not done;**

(*b*) The Referee shall order possession to remain in the debtor [(s)(1)]. **This was not done;**

(*c*) After the foregoing provisions have been complied with [which was not done], "the court shall stay all judicial or official proceedings . . . against the debtor or any of his property *for a period of three years*" [(s)(2)]. **This was not done.**

(*d*) During such three years, the debtor shall be permitted to retain possession of his property [(s)(2)]. The debtor [Mr. Wright] was never accorded such three years *statutory* possession; and [as aptly indicated on the first page of the Opinion by DOUGLAS, J.] the three years stay never started to run. **The three years statutory delay was never accorded to Mr. Wright.**

(*e*) At the end of such three year statutory possession, the court may cause a re-appraisal of the property or "fix the value of the property" [(s)(3)]. **That was never done.**

The District Court never did "fix the value of the property", *after* compliance with the requirements of (s)(3), to wit: at the end of three years (or prior thereto in the event the debtor attempted to pay into court the amount of the original appraisal of the property). Consequently, the District Court's action in fixing the value of the property at $6000, *did not validly* "fix the value of the property" as required by (s)(3); but it was the District Court's voluntary action entirely outside of (s); **and such action did not give any statutory validity to that valuation (R 55, ¶ 14).**

For the reasons stated in footnote [1], this Court *properly reversed* the judgments below; and it should have remanded this case for further proceedings to be taken in accordance with the plain requirements of the Frazier-Lemke Act.

However, the *specific reasons* which the **Opinion** gave for the reversal *were erroneous*, and should be withdrawn.

II. The reasons why the Opinion should be modified, so as not to overrule the Radford and Vinton Branch cases.

Union Central petitions (i) for a modification of so much of the **Opinion** [2] as attempts to construe (and to reconcile) the two *provisos* in § 75(s)(3);—for the reason that no such question was properly before this Court; and (ii) for a modification of so much of the **Opinion** as says that the mortgagor is entitled (against the mortgagee's wishes) to purchase, or to redeem, the mortgaged property at some appraised value (or at some value fixed by the court);—for the reason that this Court has heretofore decided that Congress cannot *constitutionally* deprive the mortgagee of his paramount right to have a judicial sale, at which he may bid upon the mortgaged property up to such amount as he chooses to offer.

This point was never raised **in the Briefs**, or at **the oral argument**, or in the **Opinion.**

The grounds for this Petition for Modification are:

First: Without any consideration whatever, the **Opinion** erroneously overruled two prior decisions, to wit; (1) *Louisville Bank* v. *Radford*, 295 U. S. 555, without the slightest reference to it; and (2) *Wright* v. *Vinton Branch*,

[2] It will be designated throughout as **Opinion.**

300 U. S. 440, with only the scantiest—and at that *erroneous*—reference to it.

The **Opinion** should not be allowed *silently to overrule* an important question of constitutional law which was involved, argued, and specifically decided, in the *Radford* and *Vinton Branch* cases—at least without some consideration of the subject so as to show that this Court appreciated that it was changing its position on such an important question of constitutional law under the Fifth Amendment.

Second: The **Opinion** considers sub-section (s)(3) as if the only question involved were one of *mere statutory interpretation*, unembarrassed by any *constitutional* considerations or by any prior decisions of this Court. If that were all that was involved, the **Opinion's** reasoning is most persuasive, and is probably very sound.

The trouble is that, in the *Radford* and *Vinton-Branch* cases, this Court has already imposed a *definite constitutional limitation* upon the power of Congress to do the precise thing which the present **Opinion** simply *assumes* (*a*) is wholly free from all constitutional limitations, and (*b*) only need be considered as a matter of *statutory interpretation*.

The present **Opinion** completely overlooked the fact that this Court has decided that a mortgagee is entitled, **as a matter of constitutional right**, to have the specific property devoted to the payment of his debt, by a judicial sale at which he may freely bid whatever amount he chooses to offer for the mortgaged property; and that a deprivation of that right violates the Fifth Amendment (*Radford* case, 295 U. S. at pp. 579-582, 584, 589, 590, 594-5, 602; *Vinton-Branch* case, 300 U. S. pp. 457, 459, note 4, 468).

Overlooking—or at least not commenting upon—those vital constitutional considerations, the **Opinion** considers the two *Provisos* in sub-section (s)(3) merely as two inconsistent *Provisos* which must be reconciled; and, on that

basis, the reconciliation is, as we have already stated, quite persuasive, and doubtless entirely sound.

This, however, brings us to the critical point, viz.: those two *Provisos* cannot be construed merely as an original proposition of *statutory interpretation;* but they must be construed in the light of the *Radford* and *Vinton-Branch* decisions that, constitutionally, Congress cannot deprive the mortgagee of his paramount right to have the specific mortgaged property devoted to the satisfaction of his debt through a public judicial sale.

Third: The *Radford* and *Vinton Branch* cases held (*a*) that § 75(s) of the *original* Frazier-Lemke Act was void; but (*b*) that the 1935 *amended* (s) was valid, because, while the original (s) had *deprived* the mortgagee of, the amended (s) had fully *preserved* to the mortgagee, five fundamental property rights (295 U. S. at pp. 594-5; 300 U. S. at pp. 457-468) to-wit:

(1) Mortgagee's "right to retain the lien until the indebtedness thereby secured is paid";

(2) Mortgagee's "right to realize upon the security by a judicial public sale";

(3) Mortgagee's "right to determine when such sale shall be held, subject only to the discretion of the Court";

(4) Mortgagee's "right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of his debt, either through [a] receipt of the proceeds of a fair competitive sale, or [b] by taking the property itself";

(5) Mortgagee's "right to control meanwhile the property during the period of default, subject to the

discretion of the Court, and to have the rents and profits collected by a receiver for the satisfaction of the debt."

Without any discussion of the subject whatever, the present **Opinion** now construes sub-section (s) so as **to deprive the mortgagee of the first four of those fundamental property rights** which had been constitutionally established in the *Radford* and *Vinton Branch* cases, to-wit:

(1) Union Central *is not allowed* "to retain the lien [on the farm] until the indebtedness thereby secured is paid"; but it *must surrender* its lien entirely, if Mr. Wright chooses to pay the value fixed by the Court;

(2) Union Central *is not allowed* "to realize upon the security by a judicial public sale"; but it is *required to accept* whatever the Court may fix as the value, without such value being determined by a judicial public sale;

(3) Union Central *is given no right* "to determine *when* such judicial public sale shall be held"; because *no sale* is to be held at any time.

(4) Union Central *is denied the right* "to protect its interest by bidding at such [judicial public] sale" so as "to assure having the mortgaged property devoted primarily to the satisfaction of its debt" through "a fair competitive sale, or by taking the property itself."

In the *Radford* case, the great constitutional question there decided, and then re-affirmed in the *Vinton Branch* case, was that Congress **could not compel the mortgagee to accept some appraised value of the property less than the debt,**—because that would take away his common law right to have the *mortgaged property itself* devoted to the payment of the mortgage debt [either through receiving the proceeds of a fair competitive sale, or by taking over the property itself.]

In the *Radford* case, the Louisville Bank's BRIEF, page 25, thus asserted that fundamental constitutional right.[3]

This Court adopted the Louisville Bank's contention as sound, in the following language of Mr. Justice BRANDEIS (295 U. S. at 579, 580, 584, 589, 590, with a wealth of authorities cited):

> "No instance has been found, except under the Frazier-Lemke Act, of either a statute or decision compelling the mortgagee to relinquish the property to the mortgagor free of the lien unless the debt was paid in full.
>
> **This right of the mortgagee to insist upon full payment before giving up his security has been deemed of**

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[3] The Brief asserted:

A.

"THE FUNDAMENTAL LAW VESTS IN A MORTGAGE THE RIGHT TO HAVE THE MORTGAGED PROPERTY DEVOTED EXCLUSIVELY TO THE SATISFACTION OF THE MORTGAGE DEBT.

It has always been the fundamental law in this country that a mortgagee had the right to receive the full proceeds (up to the amount of his debt) of a sale of the mortgaged property. At the sale the mortgagee could protect himself by bidding in the property. **In other words, the very essence of a mortgage was the right of the mortgagee to have the property devoted to the satisfaction of his debt.**

Until the passage of the Frazier-Lemke Act, no court or legislative body had ever provided that the debtor might keep the property for himself, while forcing the mortgagee to accept an amount less than his debt—an amount not determined by a sale of the property at which the general public, including the mortgagee, had the opportunity to bid.

For hundreds of years the laws of England and America have guaranteed to a mortgage creditor the exclusive right to have the full value of the mortgaged property applied towards the payment of his debt. . . .

This is so because the "fundamental law" on the subject has always been, until the passage of the Frazier-Lemke Act, that the creditor was entitled to have the thing pledged devoted to the payment of his debt and that the right of the debtor to retain title to the property pledged, was subject to the paramount right of the creditor to have the property sold and the proceeds applied towards the payment of the creditor's claim."

> **the essence of a mortgage** . . . To protect his right to full payment or the mortgaged property, the mortgagee was allowed to bid at the judicial sale on foreclosure . . . **No court appears ever to have authorized a sale at a price less than that which the lien creditor offered to pay for the property in cash** . . . The Frazier-Lemke Act is the first instance of an attempt, by a bankruptcy act, to abridge, solely in the interest of the mortgagor, **a substantive right of the mortgagee in specific property held as security** . . . It [the effect of the Act] is the taking of substantive rights in specific property acquired by the Bank prior to the Act."

In the *Vinton-Branch* case [through references to Congressional Committee reports and explanations], this Court re-emphasized that the amended sub-section (s) *plainly intended* that the mortgagee should still have the right to protect his lien interest on the property **by having a judicial sale and by being permitted to bid at such sale when held** (300 U. S. at p. 459, note 4).

Nothing decided since even refers to or in any wise modifies this fundamental right of the mortgagee, constiutionally established in the *Radford* and *Vinton-Branch* cases.[4]

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[4] The *Union Central* case (304 U. S. 502) related to the application of the amended frazier-Lemke Act to a foreclosure suit in a State Court where the right of redemption had not expired.

The *Bartels* case (308 U. S. 180), merely decided that the benefits of the Frazier-Lemke Act as amended would not be denied to a farmer on the ground that there was no reasonable probability of his rehabilition, or that he did not act in good faith or that his equity in the property was not worth the mortgage debt.

Kalb v. *Feuerstein* (308 U. S. 433) involved nothing but the effect of the Frazier-Lemke Act, as amended, upon the jurisdiction of a State court foreclosure.

The *Borchard* case (310 U. S. 311) decided that the mortgagee was not entitled to have a sale until the mortgagor had first received the benefit of the three years' possession (from the date of the order giving him such possession) provided for in the Frazier-Lemke Act as amended.

Criticism of the Opinion.

The **Opinion** should be re-cast and greatly modified, because it *erroneously* asserts that, *constitutionally,* under §75(s)(3),

> (*a*) The mortgagor is entitled to acquire the mortgaged property, and to take it free of lien, upon the payment of **some value fixed by appraisement or by the court**; and
>
> (*b*) The mortgagee has no constitutional claim to anything *more* than such value as fixed by appraisement or by the court; and cannot insist upon his right to a public judicial sale at which he may bid what he pleases in order to have the mortgaged property specifically applied to the payment of his secured debt.

The **Opinion** ignores what was actually decided in the *Radford* and *Vinton Branch* cases. It states, over and over again, in one form or another (1) that a mortgagee has no constitutional right to have the mortgaged property specifically devoted to the payment of the debt by a judicial sale at which he can bid what he pleases on it; and (2) that, *constitutionally,* a mortgagee is only entitled to receive "the value of the property" **as fixed by an appraisement or by a court.**

We will give some characteristic quotations from the **Opinion** with our running comment thereon.

The **Opinion** says (p. 4):

> "Safeguards were provided to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the property. *John Hancock Mutual Life Ins. Co.* v. *Bartels, supra,* at pp. 186-187; *Borchard* v. *California Bank, supra,* at p. 317. There is no constitutional claim of the creditor to more than that."

Comment: That is erroneous. The secured creditor (mortgagee) has a constitutional claim to receive more than the value of the property as fixed by some appraiser or by some court. He is entitled to have the *property itself* devoted to the payment of his debt. It was the failure of the original Frazier-Lemke Act to preserve that right, and its attempt to deprive the mortgagee of his fundamental property right in that respect (as elaborately shown by Mr. Justice BRANDEIS in the *Radford* case, 295 U. S. at pp. 578-580, 588-591, 594, 601) which made the original sub-section (s) unconstitutional. (See pp. 5-8, *supra.*)

Without stopping to point out (1) that the cited passage from the *Borchard* case "begs the question" as to what constitutes the *constitutional* "value of the property"; (2) that the cited passage from the *Bartels* case, not only does not support the **Opinion,** but plainly indicates that the mortgagee is entitled to a public sale and to bid thereon as much as he pleases (to the full value of his debt and interest or more); and (3) that the mortgagor merely has the usual right to redeem within a limited time at such *sale price,*—it is enough to observe that those cases do not in the remotest degree support the proposition that the **"constitutional claim of the creditor"** is limited to some appraised or fixed value of the property.

Again, the **Opinion** says (p. 4):

> "And the creditor will not be deprived of the assurance that the value of the property would be devoted to the payment of its claim. For, as indicated in *Wright* v. *Vinton Branch,* 300 U. S. 440, 468, if the debtor did redeem pursuant to that procedure, he would not get the property at less than its actual value."

Comment: That is fallacious; and, in its context, is incorrect, because (*a*) it assumes that the creditor is only

entitled to receive the "value of the property" as fixed by an appraiser or by the court; (*b*) it forgets that this Court has already decided in the *Radford* and *Vinton Branch* cases that the creditor is *not* limited to "the value of the property" *as somebody else may decide it is worth,* but is *constitutionally entitled* to have the mortgaged property itself **specifically devoted to the payment of the debt through a public judicial sale;** (*c*) a debtor's redemption of the property at a value fixed by an appraiser *might well result* in the debtor getting the property "at less than its actual value", the best test of which value is offered by a public sale; and (*d*) the *Vinton Branch* case does not merely indicate what the **Opinion** says, but it indicates very much more than that, as the following black type sentence shows (300 U. S. at p. 468):

> "But it must be *assumed* that the mortgagor will *not* get the property for less than its actual value. **The Act provides that upon the creditor's request the property must be re-appraised, or sold at public auction; and the mortgagee may by bidding at such sale fully protect his interest."**

The **Opinion** bluntly asserts (pp. 4, 5) that the mortgagor has an "express and fundamental statutory right to redeem at the reappraised value or at the value fixed by the Court"; That the mortgagee's right to a judicial sale must be "deferred or postponed" until the ~~mortgagee~~ mortgagor has had an opportunity to exercise that "fundamental statutory right to redeem" at a fixed value, in which event the mortgagee "is paid the full amount of what he can constitutionally claim."

That is not the law.

Comment: While, if standing alone, such might be a literal and proper reconciliation of the two *Provisos,* the **Opinion** overlooks that, if the Act be so construed, then it

is *invalid* because in direct conflict with the *Radford* and *Vinton Branch* cases.

The **Opinion** further asserts that the mortgagor has the absolute right

> "to have the property reappraised or the value fixed at a hearing" (p. 6);

and

> "he was then entitled . . . to redeem at that value; and that if he did so redeem, the land should be turned over to him free and clear of encumbrances and his discharge granted" (p. 6);

and that the Court has no discretion

> "to deny or to grant the debtor's right to redeem at the reappraised value or at the value fixed by the Court" (p. 5);

because Congress has itself absolutely determined that subject.

That is not constitutionally correct.

Comment: The exact contrary was decided in the *Radford* and *Vinton Branch* cases.

If there is any one thing which those cases decided it was that the mortgagor-debtor **did not have the right** to acquire the mortgaged premises **at some redemption value fixed by an appraiser or by the Court;** but that the mortgagee had the right to have a judicial public sale of the mortgaged property at which he could competitively bid upon it, and buy it in, if he pleased; and that the debtor's right was limited to a *subsequent* redemption (within a limited time) at the value of the property **as determined by such judicial sale.**

We have not overlooked that the *Vinton Branch* case, in expounding the *Radford* decision, listed the five fundamental property rights, and then said (300 U. S. at 457):

> "It was not held [in the *Radford* case] that the deprivation of *any one* of these rights would have rendered the Act invalid, but that the effect of the statute in its entirety was to deprive the mortgagee of his property without due process of law."

But as shown above, the **Opinion's** construction of subsection (s) deprives the mortgagee not of "*any one* of these rights" but **deprives him of four out of the five enumerated rights**, to-wit, (1) the *retention* of the lien until the debt is paid, (2) the right to a *judicial public sale*, (3) the right to determine *when* the sale should be had, and (4) the right to *bid the property in* so as to assure its specific devotion to payment on the mortgage debt (pp. 5-6, *supra*).

Fourth: The Congressional Committee Reports, and the Debates in the Committee and before the House, demonstrate (1) that the **Opinion's** construction of amended subsection (s) is erroneous; and (2) that Congress intended to preserve inviolate the mortgagee's paramount right to a public judicial sale—because Congress was afraid that, otherwise, even the amended section (s) would be decl ed unconstitutional [just as the original (s) had been declared void in the *Radford* case].

(1) In the *Vinton Branch* case (300 U. S. at p. 459, note 4) this Court expressly stated that it accepted that view of sub-section (s)(3) saying:

> "The new Act does not in terms provide for "The right to protect its [the mortgagee's] interest in the property by bidding at such sale whenever held . . ." But the committee reports and the explanations given in Congress make it plain that the mortgagee was intended to have this right. **We accept this view of the statute."**

In a footnote to that quotation, this Court emphasized that, after the *Radford* decision, Congress deliberately *refused to limit* the mortgagee's bid at a judicial sale to either any "appraised value", or even to the "original principal" debt, lest otherwise the amended Act might be unconstitutional; and that the Senate "had no intention of raising a further constitutional controversy by questioning the mortgagee's unqualified right to bid" (300 U. S. at p. 459).

That alone ought to be sufficient to establish that, in adopting the *amended* sub-section (s), Congress *intended to preserve* the mortgagee's paramount right to have a public judicial sale, with the unlimited right to bid thereon up to any price the mortgagee chose to give.

This demonstrates that the **Opinion's** "reconcilation" of the two supposed inconsistent *Provisos* was based on an *erroneous approach* to the subject. It should have been approached, not from the standpoint of trying to reconcile the two *Provisos,* but from the standpoint of (*a*) the *constitutional limitations* on Congress, and (*b*) Congress' *intention* to conform to such limitations—a subject not even touched upon in the **Opinion.**

(2) For completeness of discussion as to the Congressional *intent* regarding §75(s)(3), a brief legislative history will be useful.

(*a*) After the *Radford* decision, Senator Frazier introduced an amendment to the Frazier-Lemke Act so as to limit the mortgagee's lien "to the actual value of such property, as fixed by the appraisals provided for in this section," which provided that upon payment of the appraised value, the court should "turn over full possession and title of said property" to the mortgagor—thus completely destroying the mortgagee's right of sale. (S. B. 3002; 74th Cong. 1st Sess.)

The Senate *rejected* that amendment; and provided that the Court might order a public judicial sale, but limited the mortgagee's bid to an amount not in excess "of the appraised value or the original principal, whichever is the highest". (300 U. S. p. 459, note 4.)

(*b*) In order "to remove a question as to the constitutionality of the bill" the House made a public judicial sale *mandatory;* and gave to the mortgagee-creditor,

> "the right, as a matter of right, to have a foreclosure of the property in the event his debt has not been paid in full",

so that the mortgagee-creditor might

> "pursue the property by which the debt is secured. He can have it sold, under the terms of this amendment to the *highest bidder;* he may himself bid and he gets for himself whatever the property brings." (79 Cong. Record pp. 14332-4.)

(*c*) When the amended Frazier-Lemke Act was about to expire, Senator Frazier offered a bill to extend its life, and again included a provision to deprive the mortgagee of a right to a public sale [S B 1935, 76th Cong. 1st Sess.]. The Senate Judiciary Committee stated that the 1935 amended sub-section (s) had "provided for a public sale, in case the mortgagee was not satisfied with the appraisal, the re-appraisal, or the determination of the value of the property by the court upon evidence"; but it then argued at length that the mortgagee ought not to have any such right to a public sale, but should be satisfied with the *mere value of the property;* and the Senate passed the bill in accordance with that view. [Senate Report No. 1045 p. 4, to accompany S 1935, 76th Cong. 1st Sess.]

In the House, Mr. Lemke supported the Senate Bill on the ground that such an appraisal was preferable to "a

public sale". [Hearings on H R 7528 and S 1935, Serial 14, pp. 15, 16; 76th Cong. 3rd Sess. Jan. 29, 1940.]

The House Committee on Judiciary *rejected* Mr. Lemke's arguments, and refused to concur in the Senate amendment taking away the mortgagee's absolute and paramount right to a public sale, saying, [House Report 1658, p. 2, to accompany S 1935 Feb. 21, 1940, 76th Cong. 3rd Sess.]:

> "The Committee considered the proposal that the act be amended so as to withdraw from a mortgagee coming within the provisions of the law the right to protect its (the mortgagee's) interest in the property by bidding at the sale of such property at public auction, whenever held. Aside from any question of policy, in the opinion of the committee there is grave doubt as to the constitutionality of such an amendment (*Wright* v. *Vinton Branch Bank,* 300 U. S. 440; *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555; *John Hancock Mutual Life Insurance Company* v. *Bartels,* decided U. S. Sup. Ct. Dec. 4, 1939). It has concluded that it should not recommend that the act be so amended.

Thereupon the Bill (the Senate and House concurring) passed as a *mere extension* of the existing amended sub-section (s), **and without the proposed limitation on the recognized right of the mortgagee to have a judicial public sale,** as decided in the *Radford* and *Vinton-Branch* cases.

(*d*) This brief review shows that Congress, both in 1935 [when adopting the amended sub-section (s) to conform to the *Radford* decision], and again in 1940 [in *extending the life* of that same amended sub-section (s)] **deliberately refused to abridge** the mortgagee's unqualified right to a judicial public sale; recognized that such right existed; and that any limitation thereon would endanger the constitutionality of the Act itself. [See Act March 4, 1940 (No. 423, 76th Cong. 3d Sess. c. 39.)]

Conclusion.

We are very reluctant to ask this Court to reconsider an Opinion, to which it has already devoted time and labor; but, on account of the importance of the constitutional question involved regarding the property rights of a secured creditor, the foregoing Petition for Modification is submitted, in the hope that the Court will see that it approached the question from an entirely erroneous standpoint, due to the failure of counsel on both sides to direct the Court's attention to the constitutional question involved.

The Congressional intent alone, as shown at pages 13-16, *supra,* ought to be enough to demonstrate (regardless of the constitutional question involved) that there is *no inconsistency* between the two *Provisos;* that Congress saw no inconsistency; and that the true construction is that the *Proviso* for a mortgagee's judicial public sale is paramount.

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January 8, 1941.

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SUPREME COURT OF THE UNITED STATES.

No. 51.—October Term, 1940.

James M. Wright, Petitioner,
vs.
The Union Central Life Insurance Company, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[December 9, 1940.]

Mr. Justice Douglas delivered the opinion of the Court.

This case involves the same debtor and the same 200 acre tract of land as were involved in *Wright* v. *Union Central Life Ins. Co.*, 304 U. S. 502. As revealed in that case, the debtor is a farmer who filed a petition under § 75 of the Bankruptcy Act and later amended it under § 75(s), asking to be adjudged a bankrupt.[1] This Court held that the 200 acre tract was subject to the jurisdiction of the bankruptcy court and that § 75(n) extending the period of redemption was constitutional. The present record does not disclose all that has transpired in this proceeding. For example, it does not appear whether the debtor asked for an appraisal under § 75(s) which it is the duty of the court to make on such request and in which event the three-year stay provided for in § 75(s)(2) may start to run only after such appraisal has been made. *John Hancock Mutual Life Ins. Co.* v. *Bartels*, 308 U. S. 180; *Borchard* v. *California Bank*, 310 U. S. 311. But such problem is not sharply presented by the record before us. The narrow issue presented by this petition for certiorari and which moved us to grant it is whether under § 75(s)(3) the debtor must be accorded an opportunity, on his request, to redeem the property at the reappraised value or at a value fixed by the court before the court may order a public sale.

[1] Act of March 3, 1933, c. 204, 47 Stat. 1467, 1470; Act of June 28, 1934, c. 869, 48 Stat. 1289; Act of August 28, 1935, c. 792, 49 Stat. 942, 943. The petition was amended October 11, 1935, as authorized by § 75(s) as enacted by the Act of August 28, 1935. Sec. 75 has been further amended by the Acts of March 4, 1938, and June 22, 1938, 52 Stat. 84, 85, 939, and by the Act of March 4, 1940 (No. 423, 76th Cong., 3d Sess., c. 39), but in respects not material here. Sec. 75, as now in force, appears in 11 U. S. C. § 203.

On July 22, 1938, respondent filed a petition praying that the proceeding be dismissed or, in the alternative, that an immediate sale be had, and alleging, *inter alia*, that the debtor's financial condition was beyond all reasonable hope of rehabilitation, that he had failed to comply with the order of the court requiring two-fifths of the crops to be delivered to the trustee, that he had made no offer of composition, and that he had failed to pay taxes and insurance and had made no payment on principal since 1925 and none on interest since 1930. The debtor's motion to dismiss the petition was denied. On October 5, 1938, the debtor filed both an answer to the petition, and a cross petition under § 75(s)(3) to have the land appraised or a date set for hearing and after hearing evidence to have its value fixed, to be allowed to redeem at that value, and to be discharged from liability on account of any deficiency. Respondent answered alleging that the debtor was not entitled to redeem at such value and that by the terms of § 75(s)(3) its request for a sale took precedence over any such right of the debtor. The court held a hearing at which evidence was adduced. It found, *inter alia*, that the amount owed by the debtor to respondent was $15,903.63, that the value of the property was $6,000, that there was no evidence upon which might be based a reasonable hope or expectation of the debtor's financial rehabilitation, that there was no evidence of his ability to effect a refinancing of the property at that value, and that he had failed and refused to obey orders of the court. Accordingly it ordered that the property be sold "at public sale to the highest bidder and for cash, without any relief whatever from valuation and appraisement laws"; that respondent be allowed to purchase at the sale and to "utilize and be given credit for all or any part of the indebtedness of [the] debtor"; and that the debtor be barred from all equity of redemption in the property if it be not redeemed by him "within the time and in the manner allowed and provided" by § 75(s)(3).[2] On appeal to the Circuit Court of Appeals that order was affirmed, (108 F. (2d) 361), the court stating that the facts not only authorized the entry of the order but made such action imperative. We granted certiorari because of the importance of the problem to the orderly administration of the Act.

[2] Sec. 75(s)(3) grants the debtor ninety days to redeem any property sold at a public sale, by paying the amount for which it was sold, together with 5% interest, into court.

We think that the denial of an opportunity for the debtor to redeem at the value fixed by the court before ordering a public sale was reversible error.

The provision in § 75(s)(3) that at the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property, is followed by two *provisos*.[3] The first states that "upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, . . . and the debtor shall then pay the value so arrived at into court . . . ." The second provides that "upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction."

True, the granting of a request for a public sale is mandatory. But so is the granting of a request for a valuation at which the debtor may redeem. Yet a reconciliation of these seemingly inconsistent remedies is not difficult if the purpose and function of the Act are not obscured. This Act provided a procedure to effectuate a broad program of rehabilitation of distressed farmers faced with the disaster of forced sales and an oppressive burden of debt. *Wright* v. *Union Central Life Ins. Co.*, *supra*; *John Hancock*

[3] Sec. 75(s)(3) reads as follows:

"At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: *Provided*, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted; and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: *Provided*, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this Act. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act."

Mutual Life Ins. Co. v. *Bartels, supra; Kalb* v. *Feuerstein*, 308 U. S. 433. Safeguards were provided to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the property. *John Hancock Mutual Life Ins. Co.* v. *Bartels, supra*, at pp. 186-187; *Borchard* v. *California Bank, supra*, at p. 317. There is no constitutional claim of the creditor to more than that. And so long as that right is protected the creditor certainly is in no position to insist that doubts or ambiguities in the Act be resolved in its favor and against the debtor. Rather, the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress (*John Hancock Mutual Life Ins. Co.* v. *Bartels, supra; Kalb* v. *Feuerstein, supra*), lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act.

Equal protection to debtor and creditor alike can be afforded only by holding that the debtor's request for redemption pursuant to the procedure prescribed in the first *proviso* of § 75(s)(3) cannot be defeated by a request of a secured creditor for a public sale under the second *proviso*. Certainly equal protection of debtor and creditor would not be obtained if the contrary view were followed. Then the debtor's rights under the first *proviso* would be either dependent on the outcome of his race of diligence with a creditor, for which customarily he would be poorly equipped (Cf. *Kalb* v. *Feuerstein, supra*); or they would be defeasible at the instance of a creditor. Under our construction, however, the debtor will be given the benefit of an express mandate of the Act. And the creditor will not be deprived of the assurance that the value of the property will be devoted to the payment of its claim. For, as indicated in *Wright* v. *Vinton Branch*, 300 U. S. 440, 468, if the debtor did redeem pursuant to that procedure, he would not get the property at less than its actual value. In that case this Court, in sustaining the constitutionality of § 75(s), emphasized that the Act preserved the right of the mortgagee to realize upon the security by a judicial sale. By our construction the exercise of this right is merely deferred or postponed until the other conditions and requirements of the Act, prescribed for the protection of the debtor, have been met. It is eventually denied the creditor only in case he is paid the full amount of what he can constitutionally claim.

Respondent, however, places great reliance on that part of § 75 (s)(3) which provides that if the debtor "at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act." This provision is somewhat ambiguous. And no significant light is thrown on its meaning by the Committee Reports.[4] To be sure it was relied on by this Court in *Wright* v. *Vinton Branch, supra,* pp. 460-462, for the conclusion that the three-year stay provided for in § 75(s)(2) is not an "absolute one" but that "the court may terminate the stay and order a sale earlier." (p. 461.) But there is nothing in that opinion or in the Act which says that that power of the court may be utilized so as to wipe out the clear and express right of the debtor under § 75 (s)(3) to redeem at the reappraised value or at the value fixed by the court. Nor can the existence of that power be fairly implied. The power of the court to "order the property sold or otherwise disposed of as provided for in this Act" cannot be taken to mean a discretionary power to terminate the proceedings through the exclusive device of a public sale. Congress has provided that certain contumacious conduct on the part of the debtor or his inability to refinance himself within three years may be an appropriate basis for a termination of the proceedings or for an acceleration thereof. We cannot infer, however, that Congress intended that such facts should have any further legal significance under the Act. To hold that they empowered the court to deprive the debtor of his express and fundamental statutory right to redeem at the reappraised value or at the value fixed by the court would be to imply a power of forfeiture wholly incompatible with the broad design of the Act to aid and protect farmer-debtors who were victims of the general economic depression. *Wright* v. *Vinton Branch, supra,* p. 466. Such an important remedial right cannot be lost by mere implication. And to hold that the court has the discretion to deny or to grant the debtor's right to redeem at the reappraised value or at the value fixed by the court, dependent on general equitable considerations, would be to rewrite the Act, so as to vest in the court a

[4] S. Rep. No. 985, 74th Cong., 1st Sess.; H. Rep. No. 1808, 74th Cong., 1st Sess.

power which Congress did not plainly delegate. This discretionary power of the court is exhausted when the court terminates the proceedings or accelerates their termination. Such termination can be effected only pursuant to the precise procedure which Congress has provided. And so we return to our reconciliation of the two apparently conflicting *provisos* of § 75(s)(3).

We hold that the debtor's cross petition should have been granted; that he was entitled to have the property reappraised or the value fixed at a hearing; that the value having been determined at a hearing in conformity with his request, he was then entitled to have a reasonable time, fixed by the court, in which to redeem at that value; and that if he did so redeem, the land should be turned over to him free and clear of encumbrances and his discharge granted. Only in case the debtor failed to redeem within a reasonable time would the court be authorized to order a public sale.

Some question has been raised as to the propriety of certain provisions of the public sale order, particularly those which give the creditor the right to utilize all of its indebtedness in bidding for the property.

The majority of the Court is of opinion that except for the modification we have indicated the order for sale should stand with the privilege of the respondent mortgagee to purchase at the sale and to receive credit for the indebtedness of the debtor in satisfaction of the purchase price and with the privilege of the debtor to redeem within ninety days upon payment of the sales price and interest thereon, as provided by § 75(s)(3) of the Act.

To the extent indicated, we modify the judgment; and we remand the cause to the District Court for further proceedings in conformity with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.